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Supreme Court, U.S.
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No. 96-379

In The

Supreme Court of the United States

October Term, 1996

EDWIN KING, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Petitioners,

v.

AMERICAN CIVIL LIBERTIES UNION OF MISSISSIPPI, INC. ET AL. AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

v.

KIRK FORDICE, GOVERNOR, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION OF THE ACLU/MS, DELTA MINISTRY, RIMS BARBER, KEN LAWRENCE, OWEN BROOKS, ET AL.

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BRIEF IN OPPOSITION

The respondents respectfully request that this Court deny the Petition for Writ of Certiorari, seeking review of the Fifth Circuit's judgment in this case. That opinion is reported at 84 F.3d 784 (5th Cir. 1996).

OPINIONS BELOW

In 1981, the Fifth Circuit rejected Mississippi's argument that privilege could serve as a basis for keeping its Sovereignty Commission files under seal. *American Civil Liberties Union of Mississippi, Inc. v. Finch, et al.*, 638 F.2d 1336 (5th Cir. 1981). After a consent decree prohibited surveillance of and interference with First Amendment activities (R. 1914), the District Court, in 1989, ruled unconstitutional the state statute[1] which had made it a crime to know the contents of the Sovereignty Commission files. *American Civil Liberties Union of Mississippi, Inc., Delta Ministry, Owen Brooks, and Ken Lawrence, on Behalf of Themselves and a Class of Others v. Ray Mabus, as Governor of the State of Mississippi, et al.*, 719 F. Supp. 1345 (S.D. Miss. 1989). That portion of the decision was not appealed. The District Court also ruled that the Sovereignty Commission files, as state agency records, were subject to the Mississippi open records law[2] with regard to issues of privacy or disclosure. The 1990 Fifth Circuit

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[1] Section 39-5-63, Miss. Code Ann. (Supp. 1972).

[2] Mississippi Public Records Act of 1983, Miss. Code Ann. § 25-61-1 *et seq.*

opinion, *American Civil Liberties Union, Inc. v. State of Mississippi v. King*, 911 F.2d 1066 (5th Cir. 1990) remanded for consideration of notice to class members and privacy interests. The District Court's findings and remedy on remand, unreported, were approved by the Fifth Circuit, saying "We find that the district court's findings of facts are not clearly erroneous, *see ACLU v. Mississippi*, 911 F.2d at 1069, and that the remedy devised, while necessarily imperfect, was not an abuse of discretion." *American Civil Liberties Union of Mississippi, Inc., et al., v. King v. Fordice*, 84 F.3d 784, 787 (5th Cir. 1996).

STATEMENT OF THE CASE

Decades of surveillance and intrusion by the Mississippi State Sovereignty Commission have been reduced, for purposes of this review, to six filing cabinets worth of papers, of which roughly three-quarters are old newspaper articles. *American Civil Liberties Union, Inc. v. State of Mississippi v. King*, 911 F.2d 1066, 1074 n.8 (5th Cir. 1990).

Prior to allowing public access to these documents, the District Court ordered notice to be given in national and local newspapers, in order to inform persons who might wish to assert privacy interests in information about themselves. Victims of the Commission's activities who are named within the files can then require that materials related to them remain sealed. The relief also provides that persons surveilled may, if they wish to, place a rebuttal in the files in order to clear their names. The particulars of the form of notice, the method of validating the accuracy of identities, the proceedings to

be held to settle disputes of identity, or disputes as to status as state agent or victim, or contests among persons named on the same page as to revealing the contents of that document, and other administrative details, were left still to be fashioned by the parties and the Court, as the issues became ripe.

The factual findings supporting the manner of notice chosen by the Court were not contested by counter propositions offered by petitioners. At trial, the petitioners, the "privacy" subclass, did not present any testimony, (T., Vol. II, p. 150, Vol. II, pp. 249, 294), and did not introduce any documentary evidence. (T., Vol. II, p. 250).

The District Court found as fact a number of matters that underlay the remedial order. The Court found that large quantities of the sealed files were already available to the public.[3] The petitioners in this appeal do not contest the District Court's findings that many, if not most, of the Sovereignty Commission documents may be available from other public sources.

The District Court found that leaks to the press of sealed materials from the files preceded the appearance of articles relating to Sovereignty Commission materials

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[3] A mass of Sovereignty Commission documents are publicly available at the University of Southern Mississippi through the papers of former governor Paul B. Johnson. (R. 2709) There are other documents still publicly accessible, as testimony showed, from materials circulated by the Sovereignty Commission as part of its intended purpose to use information and misinformation to shape public opinion in opposition to the civil rights movement and maintain segregation. (*E.g.*, T. Vol. II, p. 235-249) (Exh. AP-10, T. Vol. II, p. 238).

in the most widely circulated newspaper in Mississippi, *The Clarion-Ledger,* which articles were conducive to the reopening of the Medgar Evers murder prosecution. (R. 2707-2709) The Court found that the full meaning of the files' contents cannot be evaluated without a knowledge of external facts and circumstances, information that is not contained within the files themselves. Because the informational value of a document might be apparent only to the person affected by it, the Court chose to lodge the initial determination of whether the file contained private information which should remain sealed in the persons affected, themselves.

The District Court found that files similarly opened in other jurisdictions sparked little interest. (R. 2709) It found that merely redacting the names was unworkable as a solution to privacy, because the format of storage and indexing the original files was itself of historic importance. Since catalogued reports naming individuals were in files with newspaper clippings corresponding to the same events, the redacted names could be identified by mere reference to the newspaper articles. (R. 2711).

Notice to those individuals affected was found to be achievable by means of newspaper announcements. (R. 2722) The District Court found that national publication of such notice was necessary because many of the people surveilled, during Freedom Summer for example, were then young college students from out of state who would not be likely to obtain notice if publication were limited to the State of Mississippi. (R. 2722) The district judge further found that national coverage of the opening of the Sovereignty Commission files was likely to occur since that event would be newsworthy in and of itself, leading

to wire stories and media coverage from other than print journalists. (R. 2723) Direct contact with victims drawn on a model of service of process was rejected by the District Court based on its factual assessment that efforts to locate persons from addresses or names they might not have used for forty years was simply not realistic.

The petitioners appear not to challenge these factual findings by the District Court. Neither have the petitioners suggested, either by testimony or by brief, how more effective notification might be obtained. Their objections that notice provisions are insufficient are without factual foundation. As the Fifth Circuit Court of Appeals has already observed, the remedy in this action cannot be perfect. In weighing the options, the District Court found that the interest in setting forth a remedy within a meaningful time was also an important consideration and outweighed the reasons to seek perfect notice, which might perpetually delay the opening of the files.

REASONS FOR DENYING THE WRIT

I. THE RULING BELOW WAS NOT AN ABUSE OF DISCRETION.

The standard of review for the fashioning of an equitable remedy is well established. The remedy devised is within the sound discretion of the district judge. *Swann v. Charlotte Mecklenburg Board of Education*, 402 U.S. 1, 28-29 (1971).

The District Court's order was issued after an evidentiary hearing in which all of the litigants were afforded an

opportunity to present evidence regarding appropriate remedies. The District Judge, who has been presiding over this litigation for 13 years, carefully weighed the competing interests of revealing the Commission's misdeeds and protecting the privacy of its victims. He crafted a remedy which provides a method for the protection of the privacy interests of the victims. The Fifth Circuit Court of Appeals, which has reviewed this case three times, concluded that the remedy ordered by the district judge was within the bounds of his discretion and tailored to the facts and circumstances of this case. Accordingly, further review by this Court is neither necessary nor appropriate. The District Judge's remedial order is constrained in scope and does not overreach, as prohibited in *Missouri v. Jenkins*, 515 U.S. ___, 115 S.Ct. 2038, ___ L.Ed.2d ___ (1995).

II. THE PETITIONERS HAVE FAILED TO STATE ANY REASON WHY THIS COURT SHOULD CONSIDER THIS CASE.

None of the cases cited by the petitioners concerns how to afford notice to persons who have suffered injury, but who do not know that their injury was caused by State agents working through the Sovereignty Commission.

The ruling below comports with *Nixon v. General Services Administration*, 433 U.S. 425 (1977), to protect the "American people's ability to reconstruct and come to terms with their history", "the desire to restore public confidence in our political processes by preserving the materials as a source facilitating a full airing of the

events" and the "need to understand how those political processes had in fact operated in order to gauge the necessity for remedial legislation," *Id.* at 453. It also parallels the public policy announcement of *Department of Justice v. Reporters' Comm. for Free Press,* 489 U.S. 749 (1989)[4] that openness serves the core purpose of contributing significantly to public understanding of the Government's operations or activities.

The petitioners have failed to advance a sound reason why this Court should consider the question that they contend is raised by the decisions below. They allege no conflict among the circuit courts and no departure from this Court's decisions by the circuit court or the district court in their resolution of the issues presented by this case. The petitioners do not ask this Court to overrule any of its own precedents, nor will the Court's consideration of the issue presented here be likely to generate a rule of broad applicability. It is, hopefully, not a recurring issue.

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[4] Cited with approval in *United States Department of Defense v. Federal Labor Relations Authority,* 510 U.S. 487 (1994) relied upon at page 10 of the Petition for Certiorari.

CONCLUSION

Certiorari should be denied.

Respectfully submitted,

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